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No. ~~11-1888~~

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUE H. HALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

~~FILED~~

~~AUG 15 1966~~

~~WM. B. LUCK, CLERK~~

OPENING BRIEF OF APPELLANT

Appeal From The United States District Court
For The Southern District Of California
Central Division

FILED

AUG 23 1966

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NOV 4 1966

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FACTS

This is an action filed by appellant in the United States District Court for the Southern District of California, Central Division, Case No. 64-1363-TC, pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. Section 1346(b), and Sections 2671 et. seq. The action was filed in the above-mentioned court on or about October 5, 1964, for personal injuries sustained by the appellant in a motor vehicle accident near Barstow, California, which occurred on November 24, 1963.

The appellee filed an answer to the complaint on or about December 11, 1964, alleging among other things as an affirmative defense that the trial court had no jurisdiction in that the action was barred by provisions of the Federal Employee's Compensation Act as set forth in 5 U.S.C. Section 757(b). On or about August 5, 1965, the appellee moved the trial court to dismiss the appellant's complaint on the ground that the trial court lacked jurisdiction over the subject matter of plaintiff's claim, alleging that the provisions of the Federal Employee's Compensation Act was the exclusive remedy for the appellant. The trial court made its order granting the appellee's motion to dismiss which was entered in the docket on August 23, 1965. The appellant appeals from the order of the trial court granting the dismissal.

The pertinent facts as illustrated by the pleadings and appellant's Affidavit submitted with her Memorandum of Points and Authorities in opposition to the motion to dismiss made in the trial court are that appellant was employed as a nurse at Fort Irwin, California, from on or about February 21, 1962, to November 24, 1963. The appellant's hours of employment at the time of the accident were from 12:00 o'clock midnight to approximately 7:30 in the morning, commonly referred to as the graveyard shift. At the time of the accident the appellant resided in Lenwood, California, which is approximately 40 miles from her place of employment at Fort Irwin, California. Barstow, California, is approximately 35 miles from Fort Irwin.

During the time Mrs. Hall, the appellant herein, was employed as above indicated, she oftentimes rode to work on a bus owned and operated by the United States Army. She would board the bus at the Greyhound Bus Terminal in Barstow and ride to work. Upon the completion of her work shift, she would board the bus at Fort Irwin and return to the Greyhound Depot in Barstow.

The accident in question occurred as above indicated on November 24, 1963, at approximately 10:36 P.M. The accident occurred while on the way to work and on the outskirts of Barstow, California, when the bus was still over 30 miles from Mrs. Hall's place of employment at Fort Irwin. Mrs. Hall alleged in her complaint under provisions of the Federal Tort Claims Act that the bus was operated negligently, and that the United States of America was responsible to respond to her in damages for personal injuries sustained by her. As of the date of filing the complaint, Mrs. Hall alleged that she had incurred medical expenses as a result of the accident in the sum of \$1,076.86 and lost wages in the sum of \$4,475.00. She further alleged that she would incur damages in the future for medical treatment and additional lost wages, and prayed for leave to amend her complaint at the time of trial to include such sums as proved by the evidence. As of August 13, 1965, Mrs. Hall was still incapable of returning to work. Mrs. Hall alleged serious permanent disability and prayed for \$350,000.00 as and for general damages.

The United States Army Bus that Mrs. Hall rode upon in getting to and from work, including the night during which the accident in question happened, was one used for the transportation of anyone who wished to use it. Primarily it was occupied by military people and civilian employees; however, the system was operated as a public conveyance, and the transportation was available to anyone who wished to use it. During the time Mrs. Hall used the facilities of the transportation system involved there was a 25¢ charge for all persons who rode on the bus that left Barstow to Fort Irwin at 6:15 A.M., and the bus which left Fort Irwin to Barstow at 4:30 P.M. The buses that ran at night, however, were provided free to anyone who wished to use them. Mrs. Hall never paid for a trip to Fort Irwin at night or returning from Fort Irwin in the morning; nor had she ever observed anyone else ever pay. She had no special pass to ride the bus, nor did anyone else to her knowledge. The transportation was not supplied as a condition of her employment, and she was welcome to use the bus or not as she wished.

The accident in question occurred on publicly owned and maintained highways in the vicinity of Barstow, and not aboard or within the confines of the Fort Irwin military reservation where Mrs. Hall was employed.

Following the accident Mrs. Hall contacted the Personnel Officer at Fort Irwin to inquire whether she was covered by the provisions of the Federal Employee's Compensation Act. At that

time she was informed that she probably was, and that she could receive benefits from the Act as soon as she had used up her sick and annual leave. On or about February 11, 1964, she again contacted the Personnel Office, at which time she was instructed that the Personnel Office had checked the matter further with the office at San Francisco, California, and had found that Mrs. Hall was not covered under the Federal Employee's Compensation Act and that she was not eligible for any benefits under that Act. It was following this that Mrs. Hall obtained counsel to prosecute her claim pursuant to the provisions of the Federal Tort Claims Act against the United States of America.

Apart from the allegations of negligence, the above facts were not controverted in the pleadings, nor were there any affidavits filed in opposition regarding the appellee's motion to dismiss.

Since the order granting appellant's motion to dismiss made in the trial court, appellant has submitted a claim pursuant to the provisions of the Federal Employee's Compensation Act in order to preserve her rights. To the date of filing this brief, neither appellant nor her counsel have been informed of the acceptance or rejection of appellant's claim from the Bureau of Employee's Compensation.

The only issue involved in this appeal is whether or not the provisions of the Federal Employee's Compensation Act bar the appellant from proceeding with her lawsuit pursuant to the rules of the Federal Tort Claims Act.

The Federal Employee's Compensation Act provides in 5 U.S.C. Section 751(a):

"The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injuries sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the wilful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or another, or if intoxication of the injured employee is the proximate cause of the injury or death."

5 U.S.C. Section 757 provides:

"The liability of the United States or any of its instrumentalities . . . shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee . . . on account of such injury or death . . .

under any Federal Tort liability statute."

Appellant concedes that if she is entitled to benefits of the Federal Employee's Compensation Act, that that remedy is exclusive as provided by law, and she has no right to proceed against the appellee under the Federal Tort Claims Act.

Pursuant to 5 U.S.C. Section 751(a), an injured party is entitled to the benefits of the Federal Employee's Compensation Act if the injury is sustained while in the performance of his duty.

Some of the cases seem to go a little further and say that an employee is entitled to the benefits of the act if injury is sustained within the scope of his duty or employment.

It has long been recognized in all jurisdictions known to appellant under either state or federal law that employees are not covered by any workmen's compensation or employee's compensation law if and when they are injured while going to or coming from work. The only situations where this general rule has not been followed in the federal courts applying the provisions of the Federal Employee's Compensation Act are those cases where the injury occurred while the claimant was going to or leaving work in private transportation, but at a time when still within the confines of the military establishment, where the claimant had applied for and received some benefits pursuant to the provisions of the Federal Employee's Compensation Act, or when the injury occurred to the claimant at a time that the claimant was being paid for his time, even though he may have

been temporarily away from his place of employment. Stiffler v. U.S., 122 Fed.Supp. 304; Etheridge v. U.S., 177 Fed.Supp. 734; Biagi v. U.S., 115 Fed.Supp. 697; Daniels-Lumley v. U.S., 306 Fed.2d 769. Mrs. Hall falls in neither of these categories in that the accident in question occurred over 30 miles from her place of employment and the military reservation where she worked, she was not being paid for her time in wages or a salary or in any other fashion at the time of the accident, the transportation was not supplied to her as an incident of her employment, and she has not received, nor prior to the filing of her lawsuit applied for any benefits under the Federal Employee's Compensation Act. In regard to the latter, appellant points out as hereinabove alleged that Mrs. Hall was expressly instructed that the provisions of the Federal Employee's Compensation Act did not apply to her case, and further that she was not entitled to any benefits under the act by the personnel in charge of making such claims at the Personnel Office at Fort Irwin, California. The fact that appellee, although knowing of appellant's injury, and although allowing her sick leave time and annual leave time while she was suffering from the injuries sustained, informed the appellant that she had no right to compensation can itself be considered consistent only with appellee itself having no intention or belief that Mrs. Hall was injured in the performance of her duty so as to bring the injury under 5 U.S.C. Section 751(a). Appellant has only applied for

the benefits of the Federal Employee's Compensation Act to preserve her rights since the trial court granted the appellee's motion to dismiss the appellant's complaint.

The only federal case found by your appellant where the facts were consistent with the facts as presented by the appellant herein is Desousa v. Panama Canal Co., 202 Fed.Supp. 22. In the Desousa case, a government employee sustained personal injuries while a passenger aboard a train owned and operated by the same governmental instrumentality by which he was employed. The case pointed out there was no distinction to be made between being employed by the government or government corporation or agency. Plaintiff filed suit against defendant pursuant to provisions of the Federal Tort Claims Act. The defendant contended that since the plaintiff was on his way to work when the accident happened, since the transportation involved was owned by the same agency for whom he was employed, and since plaintiff was entitled to special rates for the transportation on the train by reason of his employment, that the exclusive jurisdiction of the matter was through the applicable provisions of the Federal Employee's Compensation Act, and that the Federal District Court where the matter was filed had no jurisdiction. The plaintiff admitted that he was employed by the same governmental agency who owned and operated the railroad, and that he was injured in a train accident while on the way to work. The plaintiff denied that he received any special rates for his train

transportation, and alleged that the rate he paid was simply the regular rate for second-class fair available at the same price to persons who were not company employees. The defendant's motion for summary judgment was denied. The court did recognize that if the plaintiff sustained his injuries while "in the performance of his duty" as an employee of the defendant within the meaning of the Federal Employee's Compensation Act, his exclusive remedy would have been under said Act and he could not recover under the Federal Tort Claims Act. The crucial issue on the defendant's motion to dismiss in Desousa was whether or not the undisputed fact that the plaintiff was an employee of the defendant and traveling to work on the employer's railroad in and of itself necessarily showed that he was "in the performance of his duty" within the meaning of the Federal Employee's Compensation Act. The court held that an employee is not necessarily engaged "in the performance of his duties" merely by the fact that he is traveling to work on a public transportation system operated by the employer without any special arrangements with his employer, either express or implied. The court pointed out that the fact that the plaintiff traveled on the defendant's railroad may have been a mere coincidence arising out of the fact that defendant owned and operated the only available means of transportation; the court further pointed out that this was not sufficient to establish that the commuting employee was "in the performance of his duty" while engaged in

such travel. This language is particularly applicable to the appellant herein in that the bus operated by the United States Army to Fort Irwin, California, was the only transportation available to the public to travel to Fort Irwin and back to Barstow.

The Desousa case also held that the federal law must be applied in interpreting federal statute in that the court was not bound by local decisions or standards. Based on this authority, the federal decisions on the point are controlling.

The next question is what procedure should be utilized to determine the applicability of the provisions of the Federal Employee's Compensation Act. This court is entitled to rule that the Federal Employee's Compensation Act is not applicable to this factual situation and proceed with the trial of this case. Desousa v. Panama Canal Company, 202 Fed.Supp. 22 (S.D. NY. 1962), Messig v. United States, 129 Fed.Supp. 571 (D. Minn. 1955), and United States v. Martinez, 334 Fed.2d 728.

In Somma v. United States, 283 Fed.2d 149 (Court of Appeals, Third Circuit, 1960), the plaintiff who was appealing from a judgment against him in the lower court asked the Court of Appeals to pass on the question of coverage under the Federal Employee's Compensation Act. The Circuit Court of Appeals held that it was proper to have the coverage of the Federal Employee's Compensation Act determined first by the administrative body provided for by the Act before the merits of

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the plaintiff's claim under the Federal Tort Claims Act were passed upon. In this case the court said as follows:

"In so deciding, we are not abdicating the functions and responsibility of the court in favor of an administrative agency; rather, we are merely carrying out the obvious intent of Congress when it created the F.E.C.A. The Act sets up a comprehensive system of workmen's compensation for Federal employees. Congress provided that it be interpreted and administered by a Bureau of Employees Compensation and an Appeals Board whose action is not reviewable by the courts. (Citations) Obviously, the purpose in so providing was to insure uniformity of interpretation in policy. Where, as here, admittedly a substantial question of coverage exists, especially in an area in which the board has not as yet authoritatively spoken, we think it extremely important that it have the opportunity to speak first."

DISCUSSION

Appellant submits that Desousa v. Panama Canal Co., 202 Fed.Supp. 22 (S.D. NY. 1962) is the controlling authority in the present appeal. Based upon this authority, the trial court below should not have granted the appellee's motion to dismiss the appellant's complaint. There are triable issues of fact. In addition, and pursuant to the holding as expressed in Somma v. United States, 283 Fed.2d 149 (Court of Appeals, Third Circuit, 1960), the court should have at least stayed proceedings allowing appellant ample time to submit a claim for acceptance or rejection by the Bureau of Employee's Compensation. If this Honorable Court allows the order granting the dismissal by the trial court to stand, the end result could be a complete denial of any recovery whatsoever to the appellant, Mrs. Hall. This is true by reason of the fact that the Bureau of Employee's Compensation may decide to reject the appellant's claim. If this were to happen and the order of dismissal made in the lower court were allowed to stand, the appellant could not thereafter pursue her rights under the Federal Tort Claims Act in that the statute of limitations will have expired on her claim. It is respectfully submitted that this honorable court remand the appellant's case back to the trial court with instructions that the matter proceed to trial on all issues, including the issue of whether or not the plaintiff's claim is barred by the exclusive

provisions of the Federal Employee's Compensation Act, or in the alternative that the trial court be instructed to stay proceedings on the appellant's case until such time as the appellant is notified of the acceptance or rejection of her pending claim for the benefits of the Federal Employee's Compensation Act.

Respectfully Submitted,

/s/ Edward L. Heap

EDWARD L. HEAP

Attorney for Sue H. Hall,
Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Edward L. Heap

EDWARD L. HEAP

